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NOTES.

RECOVERY OF DAMAGES UNDER THE INTERSTATE COMMERCE ACT.—Section 9 of the Interstate Commerce Act purports to give to shippers the option of bringing complaints for damages before either the federal courts or the Interstate Commerce Commission.[1] But the Supreme Court, in applying its well settled doctrine that the Commission has exclusive jurisdiction to determine the reasonableness of rates or practices, has had to construe this section so broadly that the shipper is deprived of this option and compelled to resort in the first instance to the Commission in all cases except the very few where his cause of action is held not to involve the reasonableness of a rate or prac-

[1] 24 U. S. Stat. at L. 382. Section 24 of the Judicial Code, 36 U. S. Stat. at L. 1091, passed in March, 1911, gives the federal courts jurisdiction of all cases arising under the Interstate Commerce Act regardless of the amount in controversy. M'Goon *v.* Northern Pac. R. R. (D. C. 1913) 204 Fed. 998. By Act of June 18, 1910, 36 U. S. Stat. at L. 554, it is provided that suits on awards of reparation of the Commission may be brought in state as well as federal courts.

tice.[2] This is very hard upon the shipper. Even after getting a reparation order from the Commission awarding damages, he may be compelled to try the case again before a jury in court, using the finding of the Commission as merely *prima facie* evidence, because otherwise the carrier would be deprived of the right of trial by jury and deprived of property without due process of law.[3] And furthermore, the burden is thrown upon the shipper of proving that he is entitled to the precise relief which the Commission ordered, since it has been held that the court cannot modify the order, but must enforce it as it stands or dismiss it altogether.[4]

The only case where the shipper is allowed to sue originally before a court is where the carrier has done something prohibited by the Act as a matter of law, as where it has departed from a published rate, given a rebate, or made a discrimination which the Act by necessary implication forbids.[5] And it is said that even then the carrier can often drive him to the Commission by raising the defense of reasonableness.[6] In fact, the idea has grown that a reparation order from the Commission is a condition precedent to any suit at law.[7] But this view has received a very reasonable limitation in the recent case of *National Pole Co.* v. *Chicago & Northwestern R. R.* (C. C. A. 1913) 211 Fed. 65, which holds that after the Commission has once decided that a rate or practice is unreasonable, and has fixed what is reasonable, such decision has the same effect as if a statute had made the rate or practice illegal; so that any shipper may, without getting a special reparation order, bring a suit for damages before a court based on that decision. This distinction seems to have been ignored by the Supreme Court in a former decision,[8] and has been expressly repudiated by some of the lower federal courts,[9] but it finds strong support in the most recent expressions of the Supreme Court on the subject,[10] and seems sound on principle. For despite the fact that the Commission in fixing a new rate, and thereby declaring that

[2]Texas & Pac. R. R. *v.* Abilene Cotton Oil Co. (1907) 204 U. S. 426; Mitchell Coal Co. *v.* Penn. R. R. (1913) 230 U. S. 247; Baltimore & O. R. R. *v.* Pitcairn Coal Co. (1910) 215 U. S. 481 (a case of mandamus under § 23 of the Act, 25 U. S. Stat. at L. 862); 14 Columbia Law Rev. 211, 212.

[3]1 Drinker, The Interstate Commerce Act, § 280.

[4]Western N. Y. & P. R. R. *v.* Penn Refining Co. (C. C. A. 1905) 137 Fed. 343; Baer Bros. Co. *v.* Denver & R. G. R. R. (D. C. 1912) 200 Fed. 614; Detroit, G. H. & M. R. R. *v.* Interstate Commerce Commission (C. C. A. 1896) 74 Fed. 803.

[5]Penn. R. R. *v.* International Coal Co. (1913) 230 U. S. 184; Louisville & N. R. R. *v.* Cook Brewing Co. (1912) 223 U. S. 70; Hocking Valley R. R. *v.* United States (C. C. A. 1914) 210 Fed. 735. A court can take original jurisdiction where the case depends on the construction of a published rate, and not on its reasonableness. Hite *v.* Central R. R. of N. J. (C. C. A. 1909) 171 Fed. 370.

[6]See dissent of Pitney, J., in Mitchell Coal Co. *v.* Penn. R. R., *supra*, p. 280.

[7]1 Drinker, The Interstate Commerce Act, §§ 280, 240, n. 73; see Howard Supply Co. *v.* Chesapeake & O. R. R. (C. C. 1908) 162 Fed. 188.

[8]See Robinson *v.* Baltimore & O. R. R. (1912) 222 U. S. 506.

[9]Franklin *v.* Philadelphia & R. R. R. (D. C. 1913) 203 Fed. 134; National Pole Co. *v.* Chicago & N. W. R. R. (D. C. 1912) 200 Fed. 185; see Howard Supply Co. *v.* Chesapeake & O. R. R., *supra*.

[10]See Mitchell Coal Co. *v.* Penn. R. R., *supra*, pp. 257, 258, 260, 264.

a previous rate is unreasonable,[11] is theoretically not making a new law but applying existing law to given conditions,[12] yet intrinsically it is acting not in a judicial but in a legislative capacity,[13] and its finding may properly be given effect beyond the case in which it was rendered. And it is obvious that the assessment of damages based on such finding is an act judicial in nature which may well be performed by a court.

In practice, this decision if supported by the Supreme Court, will lead to two desirable results. It will relieve the shipper of the hardships incident to a preliminary complaint to the Commission in the majority of cases where damages are ultimately sought; and it will remove from the Commission the burden of passing on innumerable claims for damages which are of little or no public importance and which can be competently handled by a court and jury. This latter result has long been desired by the Commission, which has sought to limit its jurisdiction over damage cases to so-called "rate damages" as distinguished from "general damages".[14] The decision in the principal case, indeed, deals only with damages of the former kind; but the logical extension of the principle here laid down would render a reparation order by the Commission equally unnecessary in cases where consequential damages flowing from discrimination in rates or practices were claimed. In either class of cases, a jury seems equally competent to decide whether the shipper was damaged, and how much, by the rate or practice which has already been found unreasonable or discriminatory by the expert body.

Certain expressions in the principal case and of the Supreme Court in *Mitchell Coal Co.* v. *Penn. R. R.*,[15] suggest that the Commission's finding of unreasonableness would be conclusive evidence of that fact in the shipper's legal action for damages. This may arouse some objections on constitutional grounds. The carrier hardly seems deprived of its jury trial, however, simply because one element upon which its liability depends has been determined by an administrative body and in a proceeding to which the plaintiff was not a party, so long as the ultimate fact of damage is left to the jury. Again, the determination of a question of reasonableness, even though criminal liability may result therefrom, may be left to an administrative officer without violating the separation of powers required by the Constitution.[16] Nor should the due process clause be held to require the relitigation of the basic fact of reasonableness before a jury in each proceeding which involves it, since the carrier has had due notice and full opportunity to be heard on this issue. Considerations of convenience and justice alike support the suggested finality of the Commission's determination.

[11]Not necessarily, however; a rate reasonable when made may become unreasonable through changing conditions, in which event the Commission may fix a new rate but refuse reparation for the past. Baer Bros. Co. *v.* Denver & R. G. R. R. (Supreme Court, Apr. 27, 1914), not yet reported; Fidelity Lumber Co. *v.* Great Northern R. R. (C. C. A. 1912) 193 Fed. 924.

[12]Mitchell Coal Co. *v.* Penn. R. R., *supra;* Interstate Commerce Commission *v.* Goodrich Transit Co. (1912) 224 U. S. 194, 214.

[13]Mitchell Coal Co. *v.* Penn. R. R., *supra,* pp. 257, 258.

[14]Joynes *v.* Penn. R. R. (1909) 17 Int. Com. Rep. 361; 14 Columbia Law Rev. 216.

[15]*Supra.*

[16]Union Bridge Co. *v.* United States (1907) 204 U. S. 364.